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Nos. 95-259 & 95-779

**IN THE SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1995

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DARLENE WALTERS, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PETITIONERS,

*v.*

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

RESPONDENTS.

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**On Writ of Certiorari**
**to the United States Court of Appeals**
**For The Seventh Circuit**

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# REPLY BRIEF FOR PETITIONER DARLENE WALTERS

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## ARGUMENT

### 1. By their resounding silence on the issue, respondents concede that the *Zimmerman* test is cumbersome, expensive and time-consuming.

Respondents conspicuously fail to answer petitioners' arguments about the difficulty and expense of the *Zimmerman* method as compared to the ease and speed of the payroll method. *See* Ms. Walters' Brief, Section 5, pp. 40-44.

Indeed, by recounting in their Statement of the Case the time-consuming and duplicative effort to count employees and working days, respondents' failure to make argument on that point reemphasizes that the *Zimmerman* method truly is a morass. *See* respondents' Brief, Statement of the Case, p. 5-7.

### 2. The arguments of the *amici curiae* about costs and burden are not based on the facts of this case and are incorrect as a matter of general policy.

In contrast, the Brief of the *amici curiae* led by the Illinois Chamber of Commerce argues that the two methods impose equivalent counting burdens. In so arguing, the *amici* detach themselves from the facts of this case, jettison respondents and then float in a netherworld of unsupported generalizations.[1] The arguments of the *amici* are unpersuasive

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[1] Seeking to avoid the obvious fact that respondent Metropolitan is not threatened with extinction by complying with Title VII or defending this case, the *amici* argue with virtually no empirical support (1) that Metropolitan is not a "typical small business," *see* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.* p. 16-17 n. 27; (2) that there is no reason to believe that the work and scheduling practices in this case (*e.g.* flextime and compressed

(continued...)

both as a matter of the record in this case and as a matter of general principle.

First, no one -- not even the *amici* -- disputes that the counting process in this case was in fact time-consuming, complex, difficult and expensive.[2]

Second, as a general matter, the parameters of the *Zimmerman* test necessarily impose complexity on the counting process by distinguishing between the type of workers (full-time or part-time), their presence at work, whether they are on paid or unpaid leave status and so on. The *amici* attempt to camouflage this point by arguing that most small businesses already keep routine payroll records on which the employee counts can be based. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 19. However, the question is not whether the raw material -- *i.e.* time cards and the like -- already exists. Rather the question is whether sensible judicial policy should require a quick and easy, or a complex and time-consuming, analysis of whatever records do exist.

Moreover, as pointed out in Ms. Walters' opening Brief, the questions reserved by *Zimmerman* for later decision show as a matter of principle that the *Zimmerman* method is unduly

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[1](...continued)
workweeks) are widespread in smaller workplaces, *Id.* at pp. 16-17, and (3) that respondents' ability to afford this litigation is the exception among small businesses. *Id.* at p. 9 n. 12.

[2] In a footnote, the Chamber of Commerce *amici* concede the difficulty encountered by the parties herein, but assert, also without explanation, that those difficulties were atypical. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 18 n. 28.

complex.[3] Ms. Walters opening Brief, p. 26. Those complex unanswered questions would sprout in full bloom from the *Zimmerman* method, thus creating a new cottage industry of interpretation of the jurisdictional definitions in Title VII and the three other virtually identical anti-discrimination statutes. In contrast, adoption of the payroll method would conclusively end the matter and leave the courts to apply a simple quick test and then either terminate the case for lack of jurisdiction or proceed to the merits.

In essence, the *amici* seek to resurrect policy issues laid to rest by the Congress that crafted this definition into Title VII. As demonstrated in Ms. Walters' opening Brief, Congress reconciled the competing policy concerns raised by the *amici* by enacting a jurisdictional test that is based only on the number of employees during discrete time periods of the calendar year. Contrary to the suggestions of the *amici*, *see* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 23, nothing in Section 701(b) measures the size of an employer's business or the size of its total workforce. The only test is the number of employees an employer "has" "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

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[3] *Zimmerman* reserved on the following questions: how to count "hourly paid workers on paid leave," how to count "hourly paid workers on non-paid standby status," and how to count "salaried workers" 704 F.2d at 354 n. 6.

**3. The arguments of the *amici curiae* about burden on small business are inconsistent, self-defeating and contrary to common sense.**

Moreover, the *amici's* cost/burden arguments are internally inconsistent, self-defeating and nonsensical.

The *amici* urge the Court to adopt a cumbersome, complex, expensive and time-consuming jurisdictional test in order to protect small businesses from the burden and "potentially ruinous" costs of complying with civil rights laws and defending discrimination charges. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 9 n. 12. The self-contradiction is apparent.

One would think that the business community would join in petitioners' call for the simplest and quickest jurisdictional test. One would think that small businesses would hunger for an easy way to determine coverage before making employment decisions in the first instance, and in defending discrimination charges in the second.

Instead, the *amici* tout the Internal Revenue Code as an appropriate model to guide this Court's interpretation. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 18 ("[H]istory tells us that Congress is not adverse to making calculations complex . . . *[s]ee e.g.*, substantial portions of the Internal Revenue Code").

Without intending to demean the federal tax code, Ms. Walters suggests that this argument by the *amici* is unusual, to say the least. The argument is the more peculiar because respondents and the *amici* do not respond to the argument of Ms. Walters' opening Brief about the apportionment of costs under the fee shifting provisions of Title VII -- *i.e.* that an employer respondent who loses an expensive jurisdictional

fight and then the merits will pay the prevailing employee's costs and fees for that fight. *See* Ms. Walters' opening Brief, Section 5c, pp. 43-44.

Thus, by direct implication from what the *amici* say and do not say, it appears that they advocate complexity and expense in construing this statute.

Perhaps the *amici's* preference for the more expensive and cumbersome test reflects an acceptance of the associated costs as a matter of tactics. After all, even a small business is better able than an individual Title VII claimant to withstand compliance and litigation costs. Perhaps the business community recognizes that a complex jurisdictional test is another difficult barrier for a Title VII claimant to overcome, especially since it is the employer who controls the records required for the jurisdictional count but the employee who has the burden of establishing jurisdiction.

Indeed, contrary to the *amici's* argument, the issue here is in large part whether to allow small businesses to discriminate. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 8. Both the Congress that enacted Title VII and the Congress that in 1972 reduced the threshold number of employees to fifteen stated as much. As the 1971 House Report on the reduction states, "The committee feels discrimination is contrary to national policy and equally invidious whether practiced by a small or large employer. . . ." H.R.Rep. No. 92-238, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155.

But, whatever the underlying purpose of the *amici* in taking such a strange position, their arguments about costs and burdens are almost complete nonsense. The complexity and expense of the *Zimmerman* method is reason enough to reject

it.

**4. Respondents also ignore the fact that the *Zimmerman* method creates irrational extra-statutory distinctions between employees.**

Respondents ignore another of petitioners' arguments: that the *Zimmerman* method creates irrational distinctions between employees, distinctions that find no basis in the statutory text or legislative history. *See* Ms. Walters' opening Brief, Section 2d & 2g, pp. 25-26 & 29-30.

Respondents do not answer these arguments and do not justify the irrational distinctions of the *Zimmerman* method -- for example, between salaried and hourly and full-time and part-time employees, or between employees on flextime or weekend schedules. Nor do respondents attempt to tie these distinctions to the statutory language or history.

By their silence, respondents concede that those distinctions cannot be justified and that the *Zimmerman* method is nonsensical.

**5. Respondents' new arguments about mid-week employment changes demonstrate that the payroll method gives full meaning to the phrase "for each working day."**

Respondents make an entirely new argument in this Court, not raised in the two courts below, that petitioners' application of the payroll method in the courts below is at odds with petitioners' position in this Court. *See* respondents' Brief, Section IB, pp. 12-16. Respondents argue that petitioners include on the weekly payroll employees who entered or left Metropolitan's employ midweek when in fact those employees should not be counted on the weekdays before they begin, or

after they end, employment.

Respondents' new argument is nonsense. Any fine tuning of the counts of weeks involving midweek employment changes should be left to the district court on remand after this Court adopts the payroll method of counting.

In any event, even conceding the correctness of respondents' new argument, the recount of the weeks in which midweek employment changes occurred demonstrates conclusively that midweek employment changes do give real meaning to the phrase "for each working day." *See* respondents' Brief, pp. 12-16 *esp.* note 8. In each of those weeks, the midweek employment changes reduce the number of employees "for each working day" below the fifteen employee minimum, thus eliminating eight weeks from the jurisdictional count. This reduces the total number of calendar weeks that meet the jurisdictional minimum from forty-seven to thirty-nine weeks, still well above Section 701(b)'s minimum twenty week requirement.

Thus, respondents' re-analysis demonstrates that midweek employment changes give real meaning to the phrase "for each working day" by reducing the jurisdictional weeks in this case by a real and significant though not determinative number.[4]

Thereby, respondents completely demolish their own argument that the payroll method makes that phrase

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[4] Indeed, the *amici curiae* led by the Illinois Chamber of Commerce backhandedly but still explicitly concede that midweek employment changes "gives meaning to the phrase 'for each working day'. . . ." *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 22.

superfluous.

**6. The suggestions of the *amici curiae* about an increased caseload arising from the payroll method are completely misplaced.**

The *amici curiae* led by the Illinois Chamber of Commerce rather coyly forecast a flood of new cases from the payroll method. In fact, contrary to those forecasts, the payroll method will not exacerbate the anti-discrimination caseload of the EEOC and federal courts, it will ease it.

First, the *amici* miscite business census statistics, arguing that the payroll test somehow will bring employers with ten to nineteen employees within Title VI's coverage. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 10-11 n. 17 and accompanying text. This is almost inexcusable nonsense. The numerical threshold of Section 701(b) is fifteen and that threshold is further limited by working day and calendar week limitations. It is difficult to understand how statistics pertaining to employers with ten to fourteen employees enlighten this case. An employer with fourteen or less employees is never covered, under either test. Moreover, a significant part of the remaining employers -- those with fifteen to nineteen employees -- probably fall within Section 701(b) under either test. The really important part of the issue presented is whether that probable coverage should be determined under the time-consuming *Zimmerman* method, clogging the EEOC and the courts with an excruciating counting process, or under the quick and easy payroll method.

Second, judicial and agency experience after the lower court decisions adopting the payroll method reveals no increase of new small business cases. There was no such deluge in the Northeast after the First Circuit's decision in *Thurber*. And

there was not even a trickle of new cases after the decisions of the district courts that adopted the payroll method.

Indeed, in opposing the *certiorari* petitions, respondents vigorously argued that the issue presented was not of sufficient importance because "this case, and those like it are anomalies," and because "[i]n the more than 30 years since Title VII became law, the issue before this Court has arisen in only 15 reported decisions." *See* respondents' Brief in Opposition to Petitions for Certiorari, p 10.

Thus, the *amici's* flood warning is entirely unjustified. This case will effect a relatively narrow band of cases, those involving discrimination claims against employers that hover around the jurisdictional threshold in that they had fifteen employees on each working day of at least twenty calendar weeks, *etc.* As this case demonstrates, the employer would necessarily have to have at least fifteen employees on the payroll for at least those twenty weeks. Jurisdiction over those cases should be determined under the quick and easy payroll method.

7. **Adopting the broad interpretation of the exclusion as urged by respondents and the *amici curiae* is entirely unsupported in the case law and is a dangerous interpretive principle.**

Respondents argue that this Court should construe Section 701(b) "strictly" so as not to expand federal subject matter jurisdiction. *See* respondents' Brief, Section IC, pp. 16-18. The Brief of the *amici* led of the Illinois Chamber of Commerce argues that this definitional provision of Title VII is a small business "exclusion" which should be construed to exclude as many businesses as possible. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 7-9. Both

arguments are unwarranted under existing authority and are extraordinarily dangerous to the entire federal scheme of anti-discrimination laws.

The so-called small business "exclusion" of Section 701(b) is explicitly defined in terms of a certain number of employees. Thus, construing the so-called small business exclusion broadly requires the Court to exclude from coverage the very persons who are the intended beneficiaries of Title VII -- women and minorities. This would be a startling step in view of the developed body of Supreme Court and circuit and district court jurisprudence that Title VII and similar remedial anti-discrimination statutes should be construed broadly consistent with their humanitarian purposes. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980); *Thurber v. Jack Reilly's Inc.*, 717 F.2d 633, 635 (1st Cir. 1983) ("[T]he prevailing majority in Congress intended to give [Title VII] broad effect."); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979); and *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326-27 (D. Minn. 1975), *aff'd*, 566 F.2d 1178 (8th Cir. 1977). *See also Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994) (Title VII's definition of employer should be interpreted liberally); *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983) (same); *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983) (resolve any ambiguities in Title VII's definition of employee in favor of coverage); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir.1980) (Title VII's definition of "employer" construed liberally to effectuate statute's humanitarian purpose); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (same).

In any event, a debate of this issue of exclusion/inclusion is completely unnecessary in this case

because, as petitioners demonstrate in their opening Briefs, the plain language of Section 701(b), its legislative history, sound judicial policy and the need for coherence among related statutory schemes, command the use of the payroll method.

**8. The arguments of respondents and the *amici curiae* about the legislative history are completely unpersuasive.**

Respondents and the *amici curiae* go to great lengths to escape the clear legislative history that supports the payroll method. *See* respondents' Brief, Section II, pp. 18-30; and Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, Section III, pp. 24-28. Their arguments are entirely unpersuasive.

First, contrary to respondents' suggestions, Senator Dirksen was neither an isolated legislator or an opponent; he was the author and sponsor of the language at issue, and thus his remarks are of weighty significance. Respondents ignore this Court's long established rule that "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 394-95 (1951)).

Second, the remarks by Senator Dirksen are the more significant because the language at issue came from a floor amendment, not from Committee or Conference Report. Therefore, this is the only legislative history available to examine, a product of the controversial nature of the Civil Rights Act of 1964 and the unusual legislative process that led to it.

Third, respondents and the *amici* unsuccessfully seek to avoid the obvious fact that Senator Dirksen modeled Title VII's

definition of employer on the Unemployment Compensation Act which had by then been long construed by the IRS under the payroll method. *See* Ms. Walters' opening Brief, Section 3b, pp. 31-38. Respondents argue that Senator Dirksen was wrong when he said that the definition was modeled on the UCA. *See* respondents' Brief, p. 26 (Senator Dirksen's remark "appears to be something less than accurate."). The *amici* led by the Illinois Chamber of Commerce argue that the UCA's language was much different in that it used the phrase "employed . . . in employment." *See* Brief of *amici curiae* Illinois Chamber of Commerce *et al.*, p. 25.

Both arguments are unpersuasive in the extreme. Given the searing controversy about, and the intense opposition to, the civil rights legislation being considered by the Congress in 1964, the experienced Minority Leader, the Senator from Illinois, Everett McKinley Dirksen, speaking for himself, Majority Leader Mansfield and several other sponsoring or supporting Senators, surely knew what he was talking about. No further citations or argument should be needed to establish that point.

As for the language difference between the UCA and Title VII's definition, it is precisely petitioners' point that the UCA language and administrative interpretation strongly adopted the payroll method, which the Congress engrafted into Section 701(b) in somewhat different words. It is precisely petitioners' point that the UCA's phrase "'employed . . . in employment" "on each of some twenty days . . ." has the same essential meaning has Section 701(b)'s phrase "a person . . . who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . ." Both focus on the employment relationship.

Finally, respondents' argument that the IRS

interpretation of the UCA did not have the force of law and was not binding on Congress is equally as meritless. *See* respondents' Brief, pp. 26-30. Petitioners do not argue that Congress was "bound" by the IRS interpretation. Petitioners simply contend that Congress was aware of that clear unambiguous agency interpretation and intended to craft it into Section 701(b).

In conclusion, Ms. Walters notes that even the Seventh Circuit in this case agreed that "certain remarks of Senator Dirksen are consistent with [petitioners]' argument." 60 F.3d at 1227 n. 3 (Pet. App. 5a). The arguments of respondents and the *amici* that the legislative history does not support the payroll method are widely off the mark.

**9. The arguments of respondents and the *amici curiae* about the other anti-discrimination laws containing identical definitions, and their underlying legislative history, completely miss the point.**

Next, petitioners do not argue, as respondents and the *amici* erroneously suggest, that the legislative history and text of the ADEA, FMLA and ADA control the construction and legislative history of Title VII. *See* respondents' Brief, Section IIB, pp. 30-33; and Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 26-28.

Instead, petitioners argue that the text and legislative history show (1) the reasonableness of the payroll method, (2) that Congresses subsequent to that which passed Title VII have continued to use identical or virtually identical language to define employer and intend that the definition be construed under the payroll method, and (3) that given those subsequent legislative developments, adoption of the *Zimmerman* method would drastically unsettle the construction of those closely

related schemes.

Respondents give the Court no reasoned response to those arguments, arguing only that the construction of the FMLA is not presented by this case, *see* respondents' Brief, Section IIB, pp. 30-33. The *amici* led by the Illinois Chamber of Commerce focus on immaterial differences between the FMLA and Section 701(b) -- the employee threshold and exclusions. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 28. Both respondents and the *amici* simply ignore the clear legislative history and agency interpretation of the FMLA adopting the payroll method. *See* Ms. Walters' opening Brief, Section 2c, pp. 24-25.

By their silence, and apparently as a corollary to their affection for the complexity of the tax code, *see* Argument, *supra*, Section 3, pp. 4-5, respondents and the *amici* invite the Court to unsettle these closely related schemes and thereby infuse conflict, confusion, difficulty and expense into the whole federal anti-discrimination law.

Similarly, the response of the *amici* to Ms. Walters's workplace statistics is misplaced. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, Section ID, p. 15-17.

First, Ms. Walters' workplace statistics are not limited to the 1990s. *See* Ms. Walters' opening Brief, Section 2f, pp. 27-29. Her tabular breakdown of the participation rate of married women includes comparative statistics from 1960 to 1994. *Id.* at p. 28. That breakdown shows the drastic increase in the participation rate of a specific group of workers explicitly targeted by the 1964 Congress, thus proving the continued and increased need for Title VII's protections.

Second, the point of Ms. Walters' other statistics was simple: that Title VII should not be encrusted in an outdated

conception of the American workplace. It is a dangerous and unwise thing when our laws do not fit the social phenomenon they are designed to govern. It is no answer to suggest that Congress can simply amend Title VII if the courts shackle it in an unworkable test. Such amendments are no simple matter. The wiser judicial course is to attempt to craft a workable, sensible jurisdictional test that flows from the plain text of the statute and serves its clear legislative purpose while meeting the realities of today and tomorrow. This Court has the opportunity to accomplish just such a desirable goal by adopting the payroll method.

**10. The gaps in state anti-discrimination law coverage demonstrate why the broader application of the payroll method is required.**

Next, there is no merit to the argument of the *amici* led by the Illinois Chamber of Commerce that any gaps of coverage of Title VII are filled by state anti-discrimination laws. *See* Brief of *amici curiae* Illinois Chamber of Commerce, Section IC, pp. 11-15.

First and foremost, this is a case involving the interpretation of a federal law. The existence or non-existence of the patchwork of state laws is beside the point.

Second, the *amici's* state law canvass demonstrates that three states have no anti-discrimination laws applicable to private employers and that the laws of another nine states include the "for each working day" phrase at issue in this case. *Id.*, pp. 12-13 ns. 20-22. Thus, if this Court adopts the *Zimmerman* method, employees working in businesses excluded by the *Zimmerman* counting method would have no anti-discrimination protections in those twelve states. This alone justifies extending the Title VII's definition of employer

as far as possible consistent with the original federal legislative intent.

Third, the *amici's* arguments of cost and burden are demolished by the fact that the anti-discrimination laws of many states cover employers with fewer than fifteen employees. The few additional employers that would be covered by Title VII under the payroll test would be covered under those state laws anyway and thus would be required to comply with anti-discrimination schemes and defend such cases in any event. Dual federal/state coverage already exists for larger businesses and is well established in the law, and the deferral and work sharing agreements of the EEOC with state agencies minimize any duplicative expense of that overlapping jurisdiction. *See e.g.* 29 C.F.R. § 1601.13. Thus, the payroll method would bring this dual coverage to a few employers already covered under state laws. The simplicity and ease of the payroll method is well worth the extension of Title VII to those few additional employers.

In sum, the patchwork of state anti-discrimination laws is a strong argument **against** the *Zimmerman* method.

## CONCLUSION

Petitioner Darlene Walters respectfully asks this Court to reverse the judgment of the Seventh Circuit, to find that Metropolitan was an employer within the meaning of Section 701(b) of the Title VII of the Civil Rights Act of 1964, and to remand this case to the lower courts for full proceedings on the merits.

Respectfully submitted,

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